Supreme Court, U.S.
FILED
AUG 25 1995
CLERK

No. 95-69

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PEG KERNAN, WARDEN, *Petitioner*,

v.

THEODORE ANTHONY WESTON, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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One of the two questions presented in the petition for writ of certiorari is "[w]hether a state court's determination that a criminal defendant consented to a declaration of mistrial for purposes of the Double Jeopardy Clause is a finding of fact entitled to the presumption of correctness of 28 U.S.C. § 2254(d)" Pet. at i. In his opposing brief, respondent claims this question is not properly before the Court because petitioner did not timely raise it below. The claim is without merit. It was respondent himself who raised the issue in his brief in the Ninth Circuit. Br. of Pet'r and Appellee at 13 n.10, 17 n.16.[1/] Petitioner then joined

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1. Specifically, respondent argued that: (1) the district court's "finding" that he had not consented to the declaration of mistrial in his first trial should be reviewed for "clear error"; and (2) the contrary finding of the state appellate court was not entitled to the presumption of correctness of 28 U.S.C. § 2254(d) because it was not fairly supported by the record and because the state court

the issue in her reply brief. Appellant's Reply Br. at 5 n.2.[2/] Since the issue was raised and joined, it was properly before the Ninth Circuit. Moreover, when the Ninth Circuit failed to expressly address the issue in its opinion, petitioner alerted the court to the omission in a

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had applied state rather than federal law in making the determination. *Id.*

2. Petitioner accepted respondent's implicit concession that the existence of consent is a question of fact, and argued that the state appellate court's finding of consent was entitled to the presumption of correctness, as it was fairly supported by the record, and respondent had not shown that the state standard for determining the existence of consent was different than the federal standard. *Id.*

petition for rehearing. Accordingly, the issue was adequately raised below, and is properly before this Court.

Dated: August 25, 1995

Respectfully submitted,

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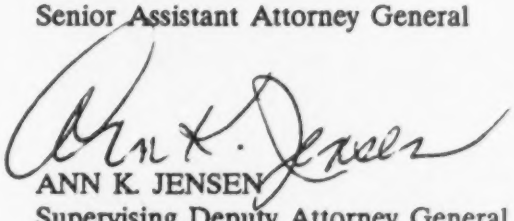

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